[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MOUNTAIN VIEW MINING AND MILLING COMPANY, APPELLANT,
v.
W. D. McFADDEN ET AL.
No. 162.

BRIEF FOR APPELLEES.

STATEMENT.

Appellant has pending in the U. S. Land Department an application for mineral patent upon a certain lode mining claim. During period of publication thereof appellees filed adverse claim thereto. This is an action brought by appellees in support of such adverse claim, under Section 2326, U. S. Rev. Stats. "to determine the question of the right of "possession." The action was originally commenced in the Superior Court of Stevens County, State of Washington, and removed thence upon appellant's petition into the U. S. Circuit Court for the District of Washing-

ton, Eastern Division. It involves the construction of the Acts of Congress approved July 1, 1892 (27 Stats. 62), entitled "An Act to provide for the opening of a part of the "Colville Reservation in the State of Washington and for "other purposes," and February 20, 1896 (29 Stats. 9), entitled "An Act to extend the mineral land laws of the "United States to the lands embraced in the north half "of the Colville Indian Reservation."

The appellant's mining locations were made *after* the Act of July 1, 1892, but preceding the Act of February 20, 1896, and the appellee's mining locations conflicting therewith were made on the latter date. At the trial the parties in effect stipulated (R. 39) that *if* the premises were in law subject to entry and mineral location prior to the passage of the Act of February 20, 1896, appellant is entitled, but if not so subject to entry and location prior to the date of such Act, the appellees are entitled. The Circuit Court held in favor of appellant (R. 40). That decision was reversed by the Circuit Court of Appeals (R. 70), Judge Gilbert dissenting only upon the question of jurisdiction (R. 81).

ARGUMENT.

I.

The Appeal Should be Dismissed.

We submit the cause is not properly before the Court, review being here sought by an appeal in what is admittedly an action at law.

The brief for appellant opens with the admission that "This case was tried in the court below as an action at "law." The record abundantly confirms this statement.

Thus the complaint (R. 1–6) distinctly pleads (par. 9) plaintiffs' (appellee's) quiet and rightful possession of the premises under legal location; the wrongful entry of defendant (appellant) and its ouster of plaintiffs therefrom with continued wrongful withholding of possession.

The case was tried upon an agreed statement of facts, under stipulation, which recites (R. 35):

"Come now the plaintiffs and defendant and expressly "waiving a jury herein, hereby stipulate that the follow- "ing shall be and are the agreed facts in this cause, and "that the same shall be taken for all purposes as the "findings of fact of the Court herein."

Thereon *judgment* was entered for defendant in the Circuit Court (R. 45), which was reversed in the Court of Appeals thus (R. 82):

"On consideration whereof it is now here ordered and "adjudged by this Court that the judgment of the said "Circuit Court in this cause be, and the same is, hereby "reversed with costs, and the cause is remanded to said "Circuit Court for further proceedings in conformity "with the opinion of this Court."

We should add that formal bill of exceptions was signed by the trial judge (R. 49–57).

Notwithstanding counsel's admission and this plain record clearly disclosing this to be an action at law, review of the *judgment* below is here sought by appeal. Appellant's counsel suggests that the Circuit Court of Appeals "treated it as a suit in equity, and we have "therefore been compelled to treat it as such upon this "appeal."

But this conclusion by no means follows. The ruling of the Court of Appeals here is based upon its prior decision in *Shoshone Mining Co.* v. *Rutter*, 87 Fed. Rep.

801. That decision was announced before this cause was decided in the Circuit Court, and hence from abundant caution the present appellees took the case to that Court both by writ of error and by appeal. Because of such dual method the appellant here moved dismissal of both the writ of error and appeal in that Court, and such motions were there denied (R. 72).

We submit the formal record is alone controlling. In the Federal courts, where the distinction between procedure at law and in equity is closely observed, a *judgment* cannot be entered in an equity cause nor a *decree* in an action at law. It is plain that court and parties hereto all joined in treating this cause as an action at law, and hence suggestions found in the opinion cannot control the judicial record. The complaint herein distinctly alleged plaintiffs' possession, and defendant's wrongful entry and ouster—the common elements of pleading in an action of ejectment.

In ruling directly upon this question this Court, in *Perego* v. *Dodge*, 163 U. S. 160, 165, said:

"Thus the determination of the right of possession as "between the parties is referred to a court of competent "jurisdiction, in aid of the Land Office, but the form of "action is not provided for by the statute; and, apparently, "an action at law or a suit in equity would lie, as either "might be appropriate under the particular circumstances, "an action to recover possession when plaintiff is out of "possession, and a suit to quiet title when he is in pos-"session."

Here the plaintiff was out of possession and so distinctly plead. Hence an action at law was the appropriate and adopted remedy. It was so treated by Court and parties, and from the *judgment* therein review could only be sought in this Court by writ of error. In *Johnson et al.*

v. *Munday*, 104 Fed. Rep., part 7, p. 594, the Circuit Court of Appeals for the Eighth Circuit has recently ruled that (syllabus)

"A suit in equity cannot be maintained in support of "an adverse claim filed against the patenting of a mining "claim to defendant, where complainant bases his claim "upon a purely legal title acquired by a purchase of the "property at sheriff's sale, the appropriate action being "one at law."

The practice in this regard is important and fundamental. The judiciary acts clearly continue the controlling distinction between review by writ of error or appeal and use of the appropriate form is essential to the power of review in this tribunal.

Deland v. *Platte County*, 155 U. S. 221.
Chase v. *United States*, 155 U. S. 489, 499.
Bucklin v. *United States*, 159 U. S. 680.

The appeal should hence be dismissed.

II.

Jurisdiction of Federal Courts Herein.

The primary question herein is (as always) the power of this Court to review the cause and dependent as of course upon proper method of removal thereof into this Court for final review. If we are correct in foregoing contention the pending appeal must be dismissed. If overruled therein, the question of jurisdiction in the courts below is next in order.

Beyond doubt the sole question presented upon the merits is clearly one of primary Federal cognizance, *i. e.*, the construction of the Congressional Acts of 1892 and

1896, cited *supra*. When the action was commenced the controlling decisions in the Ninth Circuit held an adverse claim suit brought under Sec. 2326, U. S. Rev. Stats., *per se*, within the jurisdiction of the Federal Courts, and wholly independent of any other Federal question. The complaint herein clearly disclosed this to be an action brought in support of such an adverse mining claim. Thereon the appellant filed petition for removal (R. 7), setting up therein (1) that the action was of the nature stated, and hence arising under the laws of the United States, and (2) involving construction of the Congressional Acts of 1892 and 1896, relating to the Colville Indian Reservation. The petition for removal was granted (R. 14), and our motion to remand thereafter denied by the Circuit Court. (R. Supplement.) The rule stated was still in force in the Ninth Circuit when this case was reviewed in the Circuit Court of Appeals, and reaffirmed in that Court's opinion herein (R. 72). After the cause was docketed here on Dec. 1, 1899, this Court in

Blackburn v. *Portland Mining Co.*, 175 U. S. 581;
Shoshone Mining Co. v. *Rutter et al.*, 177 U. S. 505,

overruled this doctrine. Hence upon the face of the complaint this case cannot be distinguished from these recent decisions denying such jurisdiction. Resort cannot be had to the petition for removal wherein is disclosed the second and controlling ground of Federal jurisdiction; nor to the stipulated facts which repeat the statement. But the brief of appellant's counsel pertinently suggests that as the Congressional acts of 1892 and 1896 are public statutes; as they clearly define the tract of country wherein they operate, and as the complaint as clearly describes the *locus* of the premises here in controversy, this Court *may* take judicial notice of such plain

geographical factors and readily find therefrom that the premises here in controversy do fall within the tract of country thus clearly described in those statutes. Having been taken into the Federal Court in January, 1897, and since kept there, and the case presenting a single question of law of undoubted Federal cognizance, to be ultimately determined in this Court in any event, these appellees may well be justified in indulging the earnest hope that this Court will take present jurisdiction of the cause (if the appeal be not dismissed on the ground first stated), and determine the important question presented. Under these circumstances we beg to add the suggestion that as well stated in *Greenleaf on Evidence*, 15 Ed., Vol. 1, Sec. 6, courts may take judicial notice *inter alia :*

" of the local divisions of their country, as into states, " provinces, counties, cities, towns, local parishes, or the " like, so far as political government is concerned or " affected; and of the relative positions of such local " divisions; but not of their precise boundaries, farther " than they may be described in public statutes."

And the foot-note thereto pertinently cites authorities which hold that courts will also take judicial notice whether a city or town is in the State, and if so, in what county. The complaint describes the locus of these mining claims as " situated on the north side of and about " one and one-quarter miles from the Columbia River, " and about two and one-half miles west of the town of " Northport in the County of Stevens, State of Washing- " ton * * * ," and reference to the United States public land map, aided by the description given in the Acts of 1892 and 1896, will readily disclose the premises here in dispute as located within such statutory description.

Should this suggestion be rejected we finally submit, that as the record so clearly discloses this single and controlling Federal question as alone involved, the cause may properly be remanded to the Circuit Court with liberty to the plaintiffs to there amend their complaint to thus affirmatively show this Federal question as was permitted under circumstances of like apparent merit in

Great Southern, &c., Hotel Co. v. *Jones*, 177 U. S. 449.

III.

The Merits.

The opinion of the Circuit Court of Appeals (R. 70–81) completely covers the entire case. It was rendered by Circuit Judge Ross, who, with accustomed accuracy and thoroughness of statement, reasons therefrom to unanswerable conclusion. Only the importance of the question presented and the large prospective values involved justifies amplification of the argument here.

A.

The Colville Indian Reservation was created by Executive order of President Grant on April 9, 1872. Thereby there was set apart as a reservation for certain named Indians, and such other Indians as the Government should thereafter locate thereon, a tract of country " bounded on the east and south by the Columbia River, " on the west by the Oknagon River and on the north " by the British possessions. * * *"

The power of the President to thus reserve for such public purpose, and the consequent exclusion of the land covered thereby from intrusion or appropriation by claim-

ants under the public land laws or otherwise, has been judicially recognized and settled from the earliest days.

Wilcox v. *Jackson*, 13 Pet. 498.
Grisar v. *McDowell*, 6 Wall. 363, 381.
Wolcott v. *Des Moines Nav. Co.*, 5 Wall. 681.
Leavenworth, &c., R. R. Co. v. *United States*, 92 U. S. 733, 747.

B.

By Act of August 19, 1890 (26 Stats. 355), Congress authorized the President to appoint a Commission to negotiate with the Indians for the cession of such portions of the reservation as they might be willing to so dispose of. That Commission agreed with the Indians for the cession of the north half of the reservation, and its report and agreement were transmitted to Congress by the President June 6, 1892, with draft of a bill to ratify the treaty so made. The report of the Commission and of the House Committee is copiously quoted in the opinion of the Court below, the House Committee therein recommending the ratification of the cession and passage of accompanying bill to create, among other reasons,

" A lessening of the dimensions of the Colville Reserva-
" tion, the planting of active, prosperous and well ordered
" white communities on every side of the Indians, the
" building of railroads, the creation of towns and cities,
" the opening of mines, and the consequent establishment
" of markets near at hand, etc."

And the report continues with amplified detail supporting these controlling public reasons for the action proposed. The bill, as submitted, to ratify the treated passed the House but was amended in the Senate and enacted as there passed on July 1, 1892, being entitled " An Act to

" provide for the opening of a part of the Colville reser-
" vation in the State of Washington and for other pur-
" poses."

The first section thereof provides:

"That subject to the reservations and allotment of
" lands in severalty to the individual members of the In-
" dians of the Colville Reservation in the State of Wash-
" ington herein provided for, all the following described
" tract or portion of said Colville Reservation, namely"
(giving the boundaries), " containing, by estimation, one
" million five hundred thousand acres, the same being a
" portion of the Colville Indian Reservation created by
" Executive order dated July 2, 1872, be, and is hereby,
" vacated and restored to the public domain, notwith-
" standing any Executive order or other proceeding where-
" by the same was set apart as a reservation for any In-
" dians or bands of Indians, AND THE SAME SHALL BE OPEN
" TO SETTLEMENT AND ENTRY BY THE PROCLAMATION OF THE
" PRESIDENT OF THE UNITED STATES AND SHALL BE DISPOSED
" OF UNDER THE GENERAL LAWS APPLICABLE TO THE DISPO-
" SITION OF PUBLIC LANDS IN THE STATE OF WASHINGTON."

Succeeding sections provide for such Indian allotments; disposal of all other lands under the public land laws; appropriating $30,000 for the precedent survey of the lands to be so allotted and those "to be vacated and re-
" stored to the public domain."

Immediately following the passage of this Act and on July 29, 1892, the Secretary of the Interior, by direction of the President, issued the following:

" PUBLIC NOTICE.

" Whereas, by Section one of the Act received by the
" President on June 20, 1892 (Pub. 92), entitled 'An Act
" 'to provide for the opening of a part of the Colville

" 'Indian Reservation in the State of Washington, and
" 'for other purposes,' it is provided: * * *

"And whereas, by Section four of said Act it is pro-
" vided: * * *

"And whereas, it is reliably reported that many per-
" sons have gone upon said reservation for the purpose
" of making entries or making mineral locations when
" said lands shall have been duly proclaimed to be
" opened to settlement and entry;

"And whereas, no proclamation has been or will be
" made until said lands shall have been sufficiently sur-
" veyed to—in the discretion of the President—warrant
" such opening with justice to all concerned:

"Now, therefore, notice is hereby given, that all en-
" tries, locations or settlements upon said reservation, as
" the same has heretofore been established, attempted to
" be made prior to the time of the opening thereof by
" the proclamation of the President yet to be issued
" under the provisions of Section one of said Act, are
" hereby declared to be illegal, and no person who has
" heretofore, or who shall hereafter, attempt to make such
" entries, locations or settlements prior to such opening
" by proclamation, will gain any advantage thereby, but
" on the contrary the preference will be given to those
" who legally enter upon said reservation after the same
" shall have been duly opened.

"The survey of said reservation has been ordered and
" will be completed as soon as possible, and proclamation
" will be thereafter duly made. It is intended that those
" abiding by the law shall be protected by it, and not
" those who disregard it and seek thereby to obtain an
" undue advantage over their fellow-citizens; and all
" persons now upon said reservation without express au-
" thority are warned to leave the same without delay.

"This notice is given by direction of the President."

Long prior to the President's proclamation opening this land to appropriation under the public land laws, and in full face of this public warning, the appellant's answer and the stipulated facts herein (R. 20, 36) admit that on

October 16, 1895, one Collins went upon the premises in controversy and made and, October 21, 1895, recorded the location of the Mountain View lode claim whereunder by mesne conveyances the appellant claims.

The validity of such location is here maintained by appellant upon the ground that the mineral lands were immediately opened by the Act of July 1, 1892, *supra*, without awaiting the proclamation of the President therein prescribed.

Notwithstanding this assertion (which is the sole foundation of appellant's claim) it appears that on February 20, 1896 (29 Stat. 10), and preceding such proclamation, Congress passed an Act entitled " An Act to extend the " mineral land laws of the United States to lands embraced " in the north half of the Colville Indian Reservation," by which it was declared

" THAT THE MINERAL LAND LAWS OF THE UNITED STATES BE " AND ARE HEREBY EXTENDED SO AS TO APPLY TO ALL LANDS "

described in Section one of the original Act of July 1, 1892.

The general Act of March 3, 1875 (18 Stats. 482), grants to railroads the right of way through " the public lands " of the United States," but further provides that the Act shall not apply " to any lands within the limits of any " military, park or Indian reservation, or other lands spe- " cially reserved from sale * * *."

Therefore Congress deemed it necessary to pass, on March 6, 1896 (29 Stats. 44), an Act entitled " An Act " granting to the Columbia and Red Mountain Railway " Company a right of way through the Colville Reser- " vation in the State of Washington and for other pur- " poses " whereby such right of way was granted,

" together with all the rights granted to railroads by the " 'Act of Congress entitled 'An Act granting to railroads " 'a rightof way through the public lands of the United " 'States,' approved March 3, 1875, and for the purposes " of this grant, and the construction of said railway, all " the provisions of said Act are hereby declared to be " applicable thereto to the same extent as though *the " lands in said reservation were open to settlement and " sale.*"

The right of way as described in the Act ran directly through the lands which by the Act of July 1, 1892, were to be opened by the President's future proclamation to disposal " under the general laws applicable to the dispo- " sition of public lands in the State of Washington."

C.

The Act of July 1, 1892.

The Circuit Court herein reaffirms its opinion in *Collins* v. *Bubb* (73 *Fed. Rep.* 735), to the point that whilst the Act of 1892 provided for the President's proclamation antecedent to "settlement and entry" upon the land restored, these terms could not be applied to a mining claim which is initiated by "location." But purchase of mineral lands from the United States is accomplished by payment and entry, and it cannot be said that lands are subject to location, which are not also then subject to application for patent, purchase and entry under the mining law. We may add that if the term "entry" be read in the technical way suggested in *Collins* v. *Bubb*, then the land would be open to selection by the State in satisfaction of the various grants made to her for internal improvements or to "location" by the various classes of scrip, because in neither instance, in land nomenclature,

is the technical term "entry" applied thereto, nor are they based upon "settlement."

It is impossible to say that any land is open to location which is not also and at the same time open to application, publication, purchase and *entry* under the United States mineral land laws. Taking the Act of 1892 by its language alone, it is plain that whilst the land was restored to the public domain, yet it was not to be opened either to settlement or to entry until the proclamation of the President. Upon such proclamation it was then to be "disposed of under the general laws applicable to the "disposition of public lands in the State of Washington." The "general laws" unquestionably embrace the mineral land laws, and it is equally certain that such mineral land laws were applicable to valuable mineral lands in the State of Washington. If the Circuit Court was right in holding that the land was open to location under the mineral laws, then it must follow that it was equally then (after the Act of 1892) open also to application for patent, purchase and *entry* under such laws. If that be true then the Act of 1892, on its face is extended far beyond both its letter and intent. We have not before us the arguments on which the learned judge reached his conclusion in *Collins* v. *Bubb*, but it seems to us he must have overlooked the important and controlling fact that the land must be open to entry by the mineral claimant, or it is not open to location by him. We do not think any case can be found holding that land may be open to location under the mining laws which is not at the same time open to entry and purchase by the mineral applicant. If the land is reserved, it is withheld from location as well as entry, and if it is not so reserved, then it is open both to location and entry. The principle is too plain to require citation of authority in its support.

Following the cardinal rule of construction in seeking the intention of Congress, reasonable interpretation of the language employed by the Act of 1892 brings it in full accord with legislative precedent of *then* recent date, to wit, that, in the opening of large bodies of land to disposal, the United States sought to fix a future date whereby the general public would have equal opportunity. This was done in the opening of Oklahoma and the subsequent opening of the Cherokee strip. The intention of Congress in this regard, as expressed in the Act of 1892, to adopt and apply the same policy in respect to the Colville Indian Reservation, is apparent. The policy thus expressed must be here applied to all the lands and to all classes of claimants, unless the intention to except some lands and some classes of claimants is made clear in the Act itself. None such can be found in the Act of 1892. The Act, whilst in terms of present tense vacated the former reservation and restored to the public domain the body of lands described in the Act, is equally clear and effective in providing that, as a part of the public domain, the land should not be open to settlement and entry until and by the proclamation of the President. It should be further noted that the opening of the reservation and disposal of the restored lands under the general land laws is all made dependent upon the precedent proclamation of the President. The Act opens with an express limitation. *All* lands within the part of the reservation described are not restored to the public domain, but the language is "that subject to the reservations and allotment of lands "in severalty to the individual members of the Indians of "the Colville Reservation," the lands described are "re-"stored to the public domain * * *." Had the Act stopped here the conclusion of the Circuit Court might well follow, but restoration of land to the public domain,

with an express statutory declaration that it should not be open to settlement and entry until the proclamation of the President when it should then be "disposed of under "the general laws applicable to the disposition of public "lands in the State of Washington" creates, in the first instance, an exception of all lands reserved by allotment to the Indians, and, in the second instance, makes initiation of right of disposal under any law subordinate to the precedent proclamation of the President. If this is not so and the words "settlement "and entry" have the legal effect given them by the Circuit Court, it must follow that claims under public land laws, which are not initiated by settlement or technical entry, could from and after the passage of the Act of 1892 take effect upon the lands described, anterior to any proclamation by the President. As suggested above State selections and scrip locations are abundantly illustrative of our meaning. And in such view if the President's proclamation never came, such locations and selections would be legal from the date of their tender.

This line of reasoning, it seems to us, determines that the Circuit Court takes too narrow view of the Act of 1892, both in restricting the language employed and in ignoring the policy of legislation which was well understood and enforced elsewhere, when the Act of 1892 was passed. Along the same line of policy it may be suggested that Congress purposely postponed the opening of the reservation to the occupation of the whites until the Indians had been gathered in from the vast area restored—a million and a half acres—and collected together, so that they could be looked after and possible opportunity for clash or trouble thus avoided, prior to the formal opening of the reservation by the President's proclamation. The facts recited on pages 737–738 of Judge Hanford's opinion

in *Collins* v. *Bubb*, gives strong color and support to this suggestion. As there recited, the treaty negotiations with the Indians, and which the House bill simply sought to confirm or ratify, were swept aside by the Senate, and in lieu thereof the Act of 1892, as it now appears was adopted. The Act makes no reference to any treaty, but summarily restores the entire north half of the reservation to the public domain, subject to the reservation and allotments of lands to the Indians, and makes provision for allotment to the Indians out of the lands thus restored after they have been surveyed. Section 4 of the Act indicates an additional reason for requiring the Executive proclamation prior to the opening of the reservation and general disposal under the general laws applicable to the disposition of public lands in the State of Washington, to wit, the prior survey thereof.

These suggestions unite in demonstrating that the dominant thought and purpose of Congress was to restrain the whites from entering upon the reservation for any purpose until the time fixed therefor by the President's proclamation. There is nothing said in the Act with regard to the mineral lands, and no suggestion therein that any different rule was to be applied to them with respect to the time when the reservation could be entered for mining purposes. The Circuit Court in reaching its conclusion loses sight of one plain fundamental fact, to wit, that a reservation for Indian purposes *excludes* physical entry or occupation by the whites for any purpose. Such is the trend of all public land legislation. The pre-emption law forbade it; the homestead law as originally passed and now existing authorizes settlement and entry only upon lands hitherto subject to settlement and entry under the pre-emption law; the general railroad right of way Act of March 13, 1875, expressly ex-

cludes the grant of right of way therein made from application to any Indian reservation. In short, such a reservation stands protected from adverse occupation or appropriation by positive prohibitory statutes.

Now the Act of 1892, even in using words of present tense, in restoring this land to the public domain, expressed a most clear intention that it should not be subject to *disposal* as public land, until the prior proclamation of the President, which proclamation should declare the time, and the first time, when the land "shall be open to "settlement and entry." The Circuit Court ignores the established definition of the term "public lands" as fixed in *Newhall* v. *Sanger* (92 U. S.), to wit, such land as is open to sale or other disposition under general laws. Yet this same definition has been since reaffirmed in the following cases:

Bardon v. *N. P. R.R. Co.*, 145 *U. S.* 535, 538.
Mann v. *Tacoma Land Co.*, 153 *U. S.* 273, 284.
Doolan v. *Carr*, 125 *U. S.* 618, 632.

Lands may be part of the public domain, which are not subject to disposal under general laws, and hence are not public lands in the legal sense contemplated by the decisions of this Court cited *supra*.

Thus in respect to Alaska, the Act of July 27, 1868 (15 Stats. 240), provided:

"That the laws of the United States relating to cus-
"toms, commerce and navigation be, and the same are
"hereby, extended to and over all the mainland, islands
"and waters of the territory ceded to the United States
"by the Emperor of Russia by treaty concluded at
"Washington on the thirtieth day of March, anno
"Domini eighteen hundred and sixty-seven, so far as
"same may be applicable thereto."

None of the land laws of the United States were extended to Alaska in any form until by the Act of March 17, 1884 (23 Stats. 24), providing a civil government for Alaska, it was provided, Section 8,

"and the laws of the United States relating to mining "claims, and the rights incident thereto, shall, from and "after the passage of this act, be in full force and effect "in said district, under the administration thereof herein "provided for, subject to such regulations as may be "made by the Secretary of the Interior approved by the "President. *Provided*, That the Indians or other per- "sons in said district shall not be disturbed in the pos- "session of any lands actually in their use or occupation "or now claimed by them, but the terms under which "such persons may acquire title to such lands is reserved "for future legislation by Congress."

This legislation extended the land laws as to mineral lands, and simply condoned trespass by way of occupation as to all other lands, investing the parties in such occupation with no legal rights whatsoever.

No further extension of the land laws was made to Alaska until in the Act of March 3, 1891, "To repeal the "timber culture law," etc. (26 Stats. p. 1095), wherein it was provided (p. 1100) that citizens of the United States "now or hereafter in possession of and occupying public "lands in Alaska for the purpose of trade or manufac- "ture, may purchase not exceeding one hundred and "sixty acres, to be taken as near as practicable in a square "form, of such land at two dollars and fifty cents per "acre."

By Section 14, this purchase is prohibited as to land containing gold or precious metals, or any town site.

By Act of May 14, 1898 (30 Stats. 409), Congress extended the homestead laws and provided for railroad

rights of way, &c., in Alaska, under special and restrictive terms wholly dissimilar to the general public law on those subjects applicable to the public lands in the United States proper.

And we take it that the former Crown lands in the Hawaiian Islands have become, by the annexation of the Islands to the United States, part of the public *domain* of the United States. This is so in the nature of things, because the Sovereign is the owner. Yet no one would contend that the former Crown lands in those Islands, because they have come within the public domain and ownership of the United States, are now subject to the general land laws of the United States. So with respect to Porto Rico, and what may be expected in the Philippines, where there are vast areas undoubtedly held without title from the former sovereign, and on their cession to the United States have now become part of the public domain of this Government.

All this is cited as merely illustrative of both the power vested in Congress and its exercise, whereby public domain may be in the ownership of the United States, and yet not subject to disposal, except at the time and under the conditions Congress may expressly prescribe. Hence, it must be true that the Act of 1892, in restoring this land to the public domain did *not* open it to sale and settlement until the Executive act occurred, to wit., the President's proclamation, which the statute required.

Judicial decisions confirm this view.

April 19, 1874 (18 Stats. 36) Congress passed an Act entitled:

"An Act to ratify an agreement with certain Ute In-
" dians in Colorado," etc. The Act recites the treaty with the Ute Indians made September 13, 1873. Article 1 thereof provides that—

"The confederate band of the Ute Nation hereby re-
"linquishes to the United States all right, title and
"claim and interest in and to the following described
"portion of the reservation heretofore conveyed to them
"by the United States."

Article 7 provides:

"This agreement is subject to ratification or rejection
"by the Congress of the United States, and of the Presi-
"dent."

And Section 1, of the Act of August 29, 1874, *supra*, provides that this agreement "is hereby ratified and con-
"firmed."

In *Kendall* v. *San Juan Silver Mining Company*, 144 U. S. 658, there was presented the question of a mineral location made before the passage of the Act of 1874, ratifying this treaty, and a conflicting mineral location made *after* such ratification. The Court held, page 665:

"The reservation of the premises in controversy by
"force of the Indian Treaty was extinguished April 29,
"1874. On that date the premises in controversy were
"opened to location * * *."

It will be observed that the Act of April 29, 1874, was the final ratification and confirmation of the treaty, and the Act contains no words of limitation withholding the operation of the general land laws from the territory ceded *after* its date.

This case is important in determining the rights of parties locating before and after the removal of the Indian reservation. It in effect holds that a location made on land not subject thereto is a nullity, and relocation validly made by new parties must be recognized if the original locator has not in meantime, and before such relocation

renewed his original and void location at a time when he could lawfully do so.

The case of *Noonan* v. *Caledonia Mining Company*, 121 U. S. 393, is likewise in point. There the land involved was covered by the treaty with the Sioux, and held not to be open to mineral location until February 28, 1877, the date of the Act (19 Stats. 254) ratifying and confirming the agreement with the Indians for the cession of the land to the United States without requirement of any Executive proclamation to give such cession and Act effect. In that case, however, the original locator, whose location was illegal because made prior to the Act of 1877, after the passage of the Act, renewed his location before the interposition of an adverse claim.

In this connection we call attention to *Smith* v. *Townsend*, 148 U. S. p. 490. That case involved the Act of March 1, 1889, ratifying an agreement with the Creek Indians in the Indian Territory, whereby a large body of their lands had been ceded to the United States, but the Act distinctly provided that they should not be entered upon for settlement until the President's proclamation. It is true that this Act limited their disposal to homestead entry, but the Court discusses in a very broad way the effect of this legislation, and the case closely touches upon the one at bar.

The word "entry" has, of course, a technical meaning which is, in effect, that it is the proceeding at the local Land Office under the statute, by which a person acquires either initiative right (as under the homestead law, to be followed by compliance with law in matter of settlement, etc.,) or a final right upon payment of the purchase price under a statute providing for sales, or making the final proof required under the homestead law. But in the Act of 1892, the word "entry" is not used as restricted

to the homestead law, but the language is general, to wit, "settlement and entry," and is fortified by the further express direction that after the President's proclamation shall have been published, which opens the land, same shall be disposed of under the general laws applicable to disposition of public lands in the State of Washington. This includes all laws authorizing the location of scrip, State selections, etc., as well as original homestead entries—the making of additional homestead entries—the mineral laws and entry of town-sites. The whole body of the general law is manifestly postponed in its application until after the proclamation. It hence seems to us impossible to say that this provision for disposal under the general laws does not cover the mineral land law as well.

D.

The Act of February 20, 1896.

At the first session of the 54th Congress, Senator Wilson of Washington, on January 16, 1896 (Cong. Rec. 725), introduced a bill, Senate 1591, "to extend the mineral land laws of the United States to lands embraced in the north half of the Colville Reservation;" which was read twice by its title and referred to the Committee on Indian Affairs.

On January 20, 1896 (Cong. Rec. 850), Mr. Doolittle, the member from Washington, introduced a similar bill in the House—H. R. 4462.

The Senate bill was pressed to passage.

The report of the Senate Committee on Indian Affairs (No. 163, 54th Cong. 1st Sess.), was made on February 4, 1896, by Senator Wilson from that Committee. Same contains the recommendation from the Interior Depart-

ment on the bill referred to it for opinion, including an amendment suggested by the Commissioner of Indian Affairs, excluding from the proposed operation of the bill certain lands occupied for Indian school purposes.

On February 5, 1896 (Cong. Rec. 54th Cong., 1st. Sess., pages 1319–1320), it appears that Senator Wilson called up the bill for consideration in the Senate, and in reply to an inquiry from Senator Palmer as to the manner in which the rights of the Indians were protected by the bill, Senator Wilson said :

" *Mr. President*, Some four years ago Congress passed " a bill opening the north half of the Colville Indian Res- " ervation, and providing for a survey and allotment. " The Indians are all located upon the south half of the " reservation, having now about a million and a half " acres. An appropriation was made for a survey, but " owing to the vast amount of work before the Commis- " sioner of the General Land Office he never has been able " to examine and approve the surveys which have been " made.

" Upon the discovery of valuable mineral lands in what " is known as British Columbia, it was supposed that the " mineral zone extended across into this reservation. No " Indian can take up and develop mineral land unless he is " a citizen of the United States.

" The proposition *now* is, and it has been favorably " reported by the Secretary of the Interior, the Com- " missioner of Indian Affairs, and the Commissioner of " the General Land Office, to allow the prospectors to go " in there and locate those lands; and unless they are " permitted to do so at an early day, it will take the Army " of the United States to keep them out, and ultimately " result in no good. The passage of this bill is desired " by all the people in the West. It does the Indian no " harm. I should be as quick as any Senator to protect " every right the Indian has, and in trying to get him to " locate upon agricultural land; but this land is absolutely

" valueless except for mineral purposes. It never can be " surveyed, being a mountainous country. There is no " objection to the passage of the bill on the part of the " Departments who have fully examined the matter."

Subsequent discussion by Senator Wilson went entirely to show that the Indians had no right whatever to the land, but foregoing is all that is important with respect to the Senator's statement of the scope of the bill, except his concluding statement which was—

"The bill is of great importance to the white people of " my section of the country, and it will be ultimately im- " possible to keep them out of there, for as soon as the " weather grows warmer they are going in. I have en- " deavored to hasten the passage of the bill upon the " floor of the Senate, and I hope there will be no objec- " tion to it."

And on this explanation the bill passed in the Senate without further discussion.

On February 15, 1896 (Cong. Rec. 54th Cong., 1st. Sess., p. 1751) Mr. Doolittle (who had introduced the House bill of like tenor) called up the Senate bill in the House. After stating the action in the Senate, the favorable report thereon by the Committee of Indian Affairs of the House, and the like favorable recommendation of the Interior Department, Mr. Doolittle said:

" Mr. Speaker, The reservation to which this bill relates " is in the State of Washington. There is legislation pend- " ing now having for its purpose the opening of the reser- " vation. That has been going on for some time. There " are well-known mineral lands in the reservation, and " this provides that the mineral lands may be segregated " from the great body of the lands.

" Mr. SAYERS. What reservation does this refer to?

" Mr. DOOLITTLE. The Colville Reservation.

"Mr. McMillan. I will ask the gentleman if the pur-
" pose of segregating the lands—the mineral lands—is for
" the purpose of ascertaining their value?

"Mr. Doolittle. Oh, no; it is only that these mineral
" lands, which are recognized as quite valuable, shall be
" placed under the well-known mineral-land laws of the
" United States. These lands are in the north half of the
" reservation.

"Mr. McMillan. Is this land that has been bought
" from the Indians by the United States?

"Mr. Doolittle. No; the reservation is being opened
" and the lands are to be allotted. It was an Executive-
" order reservation, and not a result of legislation.

"It seems to me that it ought to be satisfactory to the
" House when all the officials of the Department—the
" Secretary of the Interior and all—have agreed to it and
" recommend it.

"Mr. Boatner. I think we will do little harm when we
" accept the recommendation of the Secretary."

Thereupon the bill passed without further discussion. It appears as a law approved February 20, 1896, in 29 Stats., p. 9, and is there entitled:

"An Act to extend the mineral land laws of the United
" States to lands embraced in the north half of the Col-
" ville Indian Reservation."

Its pertinent language is:

"That the mineral land laws of the United States *be*,
" *and are hereby*, extended so as to apply to all lands em-
" braced within the Colville Indian Reservation, namely:"

Thence follows the description of the land in the precise language of the Act of 1892, *supra*, with a proviso that it should not apply to certain lands occupied for school purposes. The proviso has no effect upon the construction of the Act with reference to the *time* when

the lands embraced within this reservation became lawfully subject to mineral exploration, occupation, entry, and patent.

We quote the discussion in Congress not as controlling the interpretation of the Act of 1896, but as giving its legislative history, and the clear understanding of the men who secured its passage and were most deeply concerned therein on behalf of their constituents. Neither the Act, nor a word in the reports of the committees or in debate thereon, discloses any understanding indulged by either the Executive or Congress that the prior Act of 1892 had by force of its own provisions, opened this land to exploration, location and purchase under the mining laws.

The opinion of the Circuit Court of Appeals herein reasons with clearness and correctness to the conclusions (1) that the cotemporaneous and constant Executive interpretation of the Act of 1892 correctly ruled the land *not* so open to mineral location and entry, and (2) that the Act of 1896, dealing only in words of present and future operation disclosed no purpose to validate any prior attempts in that direction. The opinion also clearly reasons upon principle and authority that this declaratory Act of 1896 must be construed *in pari materia* with the former Act.

Both with respect to the right of way Act, *supra*, and the Act of 1896, extending the mineral laws to the lands embraced in the north half of the Colville Reservation, the Circuit Court's suggestion that this additional legislation should be construed as having retroactive effect, seems to us to violate all settled canons of construction.

Taking the Act of 1896 by its title, by the debate thereon (set forth in detail, *supra*), and by the legal effect of its language, it must certainly follow that the Act of 1896

speaks only from its date. In reaching a contrary result, the Circuit Court unconsciously indulges in plain contradiction. Thus it treats the Act of 1892 by its use of the words "be and is hereby vacated and restored to the "public domain," as operative from its date and opening the lands restored to mineral location and claim. Yet the Act of 1896 uses the same form of language, to wit, that the mineral land laws of the United States *be and are hereby* extended so as to apply to all land embraced within the Colville Indian Reservation, namely, etc. In other words, the Circuit Judge gave the Act of 1892 immediate and present operation, and the Act of 1896, in the use of the same words of present tense, past and retroactive operation. In short, found in the earlier Act they mean one thing, and in the later Act they mean another. But this is verbal criticism. On principle, the Act of 1896 has no retroactive operation, because—

1st. It does not, by expression or intendment seek to have retroactive effect. It is framed in language which applies to the present and the future, and is so clear upon that point as not to need interpretation. Its intention is clear upon its face.

Sutherland on Statutory Construction, Secs. 237 *to* 241.

2d. Retroactive effect is never given unless the language and intention be so plain as to wholly exclude only the future application of the statute. This is fully and well discussed in *Endlich on the Interpretation of Statutes, Secs.* 291–294.

3d. Neither by expression nor intendment does the Act of 1896 seek to *declare* the meaning of the former Act of 1892 as opening the mineral lands to location and entry. Had it sought to have done so, it is plain that dif-

ferent language would have been employed. It is no answer to this suggestion to say that the attention of the legislature may not have been called to the fact that mineral locations had been made on the assumed authority of the Act of 1892. We must take the law as we find it, and it can neither be changed by interpolation or surmise, in order to give it retroactive effect.

The Circuit Court indulged the presumption that the Act of 1896 does not show a disposition on the part of Congress to acquiesce in the rulings of the Interior Department, but rather a continuity of purpose to remove the barriers in the way of mining and construction of highways. This does not logically follow from the language of the Act of 1896 nor its interpretation by established rules. On the contrary, if it was the purpose of Congress, in the Act of 1896, to declare the Executive construction of the Act of 1892 erroneous, and to which its attention was clearly called, it was necessarily the duty of Congress to say so in such language as would have compelled its new enactment to be read as having retroactive effect. The opinion assumes in this suggestion, knowledge on the part of Congress as to the practical construction and effect given by the Executive Department to the Act of 1892. Hence it must necessarily follow that if Congress intended to correct by new enactment this Departmental construction, it was necessary to say so plainly, and not to use solely the language "be and are "hereby," which has reference only to the present and the future, and not to the past.

It is certainly true that the public at large accepted the construction of the Act of 1892 as made by the Interior Department, and obeyed its warnings against making physical entry upon the reservation prior to the President's proclamation. Parties who desired to enter law-

fully and engage in mining operations undoubtedly initiated the movement which resulted in the passage of the Act of 1896. Taking the language of that Act, and the debate which occurred in both houses on its passage, it is impossible to say that Congress expected or intended that the new Act should have retroactive operation so as to validate claims initiated by trespass upon the reservation before the President's proclamation opening the lands to disposal under the general laws applicable thereto in the State of Washington.

Manifestly, prospectors and miners who were seeking to get into the reservation did not ask Congress to enact curative legislation which would protect parties who had already gone in, made their locations, and taken their chances.

Through a long chain of decisions, the United States Supreme Court has declared that the words "be and is "hereby granted" are effective *in presenti* only. Certainly the same rule must be applied to the language of the Act of 1896, which declares that the mineral laws "be "and are hereby extended," etc. In neither case is it possible to give such language retroactive effect.

The Circuit Court also gives a most peculiar construction to the subsequent Act of Congress of March 6, 1896, *supra*, granting a right of way across this reservation for railroad purposes.

Bear in mind that the original Act of 1892 provided " that such allotted lands shall be subject to the laws of " eminent domain of the State of Washington, and shall, " when conveyed in fee simple to the allottees or their " heirs, be subject to taxation as other property in said " State."

Now these allotments, here provided for, were to be made under the Act of February 8, 1887, as amended by

the Act of February 28, 1891. Turning to Section 10 of the Act of February 8, 1887 (24 Stats. 388), it will be seen that Congress provided that nothing in the Act shall "be "so construed as to affect the right and power of Con- "gress to grant the right of way through any lands "granted to an Indian or a tribe of Indians, for railroads "or other highways or telegraph lines for the public use, "or to condemn such lands to public uses, upon making "just compensation."

Now this provision in the Act of 1892 subjecting the lands of allottees to the laws of eminent domain of the State of Washington is peculiar, because we know of no other instance in which this reserved power under Section 10 of the general allotting Act, *supra*, has been surrendered by Congress to any of the States. Notwithstanding this, however, before the President's proclamation opening up these lands under the Act of 1892, Congress *did* regard it necessary to pass a special Act granting a right of way to a railroad company thereover. If the construction given the Act of 1892 by the Circuit Court is correct, then the general right of way Act applied to the unallotted lands in the restored part of this reservation, as public lands, and the Act of 1892 gave such company the right to acquire, by condemnation, such right of way through any Indian allotments therein. In such view, the special railroad Act of March 6, 1896, was thus wholly unnecessary. Yet Congress thought otherwise, and certainly this special right of way act was again declaratory of the meaning attached by Congress to the former Act of 1892, in restricting the operation of the general public land laws, including the general railroad right of way Act, to the time when the President should, by his subsequent proclamation, declare the land open for disposal thereunder.

E.

Some additional suggestions made in the brief for appellants require reply.

1. It is said that this land was open to mineral location and claim *prior* to the Indian reservation created by the President's order of April 9, 1872, and hence on revocation thereof by the Act of July 1, 1892, it was thereby restored to its original status.

Not so. Such would have been the result but for the express provisions of the Act limiting the *time* when the public land laws should again become operative thereon, *i. e.*, after and upon the President's proclamation. Before such Indian Reservation was created the land was equally open to "settlement," yet the Act of 1892 expressly forbade such "settlement" until after the Proclamation opening the land thereto. While the land was unsurveyed, settlement could be made thereon under the pre-emption law, prior to its reservation, and while that law was repealed by the Act of March 3, 1891, settlement under the homestead law has been permitted upon unsurveyed land since the Act of May 14, 1880 (21 Stats. 140). It is hence erroneous to say (as does counsel), that mining claims and rights of way for railroads may be acquired upon unsurveyed public lands while homestead entries may not. "Settlement" is and has long been a method of initiating homestead claim upon unsurveyed land, and to assert that the Act of 1892, expressly prohibited such "settlement," and yet permitted mineral occupation, is to argue a plain *non sequitur*.

2. The contention that the Public Land Map published in 1895, in showing the north half of this reservation as part of the public domain was in legal effect the equivalent of the prescribed proclamation of the President opening these lands to settlement and entry, and to consequent

disposition under the general public land laws, is unsound. The *fact* is the President's formal proclamation was so issued on April 10, 1900 (Session Laws 1899–1900, Pamphlet, Proclamations, p. 21, No. 12), and contains an addenda giving "schedule of lands allotted to the Indians "in restored portion of Colville Indian Reservation, "Washington, and withheld from settlement and entry "by proclamation of the President dated April 10, 1900."

Thus the President faithfully carried out the expressed will of Congress (1) in surveying the lands; (2) in allotting therefrom to the Indians, and (3) restoring the remaining non-mineral lands to "settlement and entry" under the general public land laws, the Act of 1896 *supra*, having (with exception of certain tracts), from the date of that Act applied the mining laws to the mineral lands therein.

3. Counsel strenously contends that any act indicative of *intent* is sufficient to effect either Executive reservation or restoration of the public lands. Applying that suggestion, it may well be urged that the official public notice, issued by the President's order, in July, 1892 (quoted *supra*) was an effective exercise of undoubted Executive power, and hence when in October, 1895, appellant's grantor, in defiance thereof, entered upon this Reservation and made his pretended mineral location, it was a void act, not only because forbidden by the express provisions of the Act of 1892, but by reason of authoritative Executive action, and notice given in July, 1892, whereby such intrusion was forbidden.

4. Counsel is mistaken in assuming that the Act of February 28, 1877 (19 Stats. 254), ratifying the cession by the Sioux of the Black Hills country in South Dakota, required any proclamation by the President antecedent to its opening. The Act contains no such provision; was

operative from its date, and *hence* was so applied in *Noonan* v. *Caledonia Mining Company*, 121 *U. S.* 401.

5. Counsel misapprehends the force of *Bates* v. *Clark*, 95 U. S. p. 204, cited below. The case involved the question, what is Indian country, and holds that when the Indians parted with the title it ceased to be Indian country "without any further act of Congress, unless by "the treaty by which the Indians parted with their title or "by some act of Congress, a different rule was made ap- "plicable to the case." The principle thus established is analogus to the case at bar because the Act of 1892 in vacating the reservation and restoring the land to the public domain *did* apply a different rule whereby disposal of the land as part of the public domain was conditioned on the precedent proclamation of the President, and was not effective from its date as would have been the case *if* such special provision had not been made. The case applies a cognate principle and is cited only as illustrative thereof.

6. Appellant and the locator through whom it claims were bound to know the *law*, and in addition to the public statute, the Executive notice and warning had long been public. The great body of the citizens desired to enter this reservation, but respected the law while clamoring for requisite legislation from Congress opening these lands to impartial acquisition by all. No equities can be invoked in appellant's favor, the suggestions of its counsel notwithstanding.

We submit the Circuit Court of Appeals correctly ruled the question here presented and that its judgment should be affirmed.

Respectfully submitted.

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